

KERRY BAKER, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, THE DISABLED AMERICAN VETERANS

STATEMENT OF  
KERRY BAKER  
ASSISTANT NATIONAL LEGISLATIVE DIRECTOR  
OF THE  
DISABLED AMERICAN VETERANS  
BEFORE THE  
COMMITTEE ON VETERANS' AFFAIRS  
UNITED STATES SENATE  
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Mr. Chairman and Members of the Committee:

I am pleased to have this opportunity to appear before you on behalf of the Disabled American Veterans (DAV), one of four national veterans' organizations that create the annual Independent Budget (IB) for veterans programs, to summarize our recommendations for fiscal year (FY) 2009.

As you know Mr. Chairman, the IB is a budget and policy document that sets forth the collective views of DAV, AMVETS, Paralyzed Veterans of America (PVA), and Veterans of Foreign Wars of the United States (VFW). Each organization accepts principal responsibility for production of a major component of our IB—a budget and policy document on which we all agree. Reflecting that division of responsibility, my testimony focuses primarily on the variety of Department of Veterans Affairs' (VA) benefits programs available to veterans.

In preparing this 23rd IB, the four partners draw upon our extensive experience with veterans' programs, our firsthand knowledge of the needs of America's veterans, and the information gained from continuous monitoring of workloads and demands upon, as well as the performance of, the veterans benefits and services system. Consequently, this Committee has acted favorably on many of our recommendations to improve services to veterans and their families. We ask that you give our recommendations serious consideration again this year.

#### THE VETERANS BENEFITS ADMINISTRATION AND ITS CLAIMS PROCESS

To improve administration of VA's benefits programs, the IB veterans' service organizations (IBVSOs) recommend that Congress adopt both short- and long-term strategies for improvements within the veterans Benefits Administration (VBA). These strategies focus on the VBA's information technology (IT) infrastructure as well as the claims and appeals process, to include the resulting backlog. Consequently, we are also seeking improvements in VBA's training programs and enhancements in accountability and quality assurance with respect to disability ratings. If Congress accepts our recommendations, VBA will be better positioned to serve all disabled veterans and their families.

## VBA INFORMATION TECHNOLOGY

To maintain and improve efficiency and accuracy of claims processing, the VBA must continue to upgrade its information technology (IT) infrastructure. Also, VBA must be given more flexibility to install, manage and plan upgraded technology to support claims management improvement.

To meet ever-increasing demands while maintaining efficiency, the VBA must continually modernize the tools it uses to process and resolve claims. Given the current challenging environment in claims processing and benefits administration, and the ever-growing backlog, the VBA must continue to upgrade its IT infrastructure and revise its training to stay abreast of program changes and modern business practices. In spite of undeniable needs, Congress has steadily reduced funding for VBA initiatives over the past several years. In fiscal year 2001, Congress provided \$82 million for VBA-identified IT initiatives. In FY 2002, it provided \$77 million; in 2003, \$71 million; in 2004, \$54 million; in 2005, \$29 million; and in 2006, \$23 million.

Funding for FY 2006 was only 28 percent of FY 2001 funding, without regard to inflation. Moreover, some VBA employees who provided direct support and development for VBA's IT initiatives have been transferred to the VA Chief Information Officer (CIO) when VA centralized all IT operations, governance, planning and budgeting. Continued IT realignment through FY 2007 and 2008 shifted more funding to VA's agency IT account, further reducing funding for these VBA initiatives in the General Operating Expenses account to \$11.8 million. It should be noted that in the FY 2007 appropriation, Public Law 110-28, Congress provided \$20 million to VBA for IT to support claims processing, and in 2009 Congress designated \$5 million in additional funding specifically to support the IT needs of new VBA Compensation and Pension Service personnel - also authorized by that appropriations act.

All IT initiatives are now being funded in the VA's IT appropriation and tightly controlled by the CIO. However, needed and ongoing VBA initiatives include expansion of web-based technology and deliverables, such as web portal and Training and Performance Support Systems (TPSS); "Virtual VA" paperless processing; enhanced veteran self-service and access to benefit application, status, and delivery; data integration across business lines; use of the corporate database; information exchange; quality assurance programs and controls; and, employee skills certification and training.

We believe VBA should continue to develop and enhance data-centric benefits integration with "Virtual VA" and modification of The Imaging Management System (TIMS). All these systems serve to replace paper-based records with electronic files for acquiring, storing, and processing claims data.

Virtual VA supports pension maintenance activities at three VBA pension-maintenance centers. Further enhancement would allow for the entire claims and award process to be accomplished electronically. TIMS is the Education Service's system for electronic education claims files, storage of imaged documents, and work flow management. The current VBA initiative is to

modify and enhance TIMS to make it fully interactive and allow for fully automated claims and award processing by Education Service and VR&E nationwide.

The VBA should accelerate implementation of Virtual Information Centers (VICs). By providing veterans regionalized telephone contact access from multiple offices within specified geographic locations, VA could achieve greater efficiency and improved customer service. Accelerated deployment of VICs will more timely accomplish this beneficial effect.

With the effects of inflation, the growth in veterans' programs, and the imperative to invest more in advanced IT, the IB veterans service organizations (IBVSOs) believe a conservative increase of at least 5 percent annually in VBA IT initiatives is warranted. Had Congress increased the FY 2001 funding of \$82 million by five percent each year since then, the amount available for FY 2010 would be nearly \$130 million. Unfortunately, these programs have been chronically underfunded, and now with IT centralization, IT funding in VBA is even more restricted and bureaucratic.

Congress has taken notice of the chronic disconnect between VBA IT and lagging improvements in claims processing. Section 227 of Public Law 110-389 places new requirements on VA to closely examine all uses of current IT and comparable outside IT systems with respect to VBA claims processing for both compensation and pension. Following that examination, VA is required to develop a new plan to use these and other relevant technologies to reduce subjectivity, avoid remands and reduce variances in VA Regional Office ratings for similar specific disabilities in veteran claimants.

The act requires the VA Secretary to report the results of that examination to Congress in great detail, and includes a requirement that the Secretary ensure that the plan will result, within three years of implementation, in reduction in processing time for compensation and pension claims processed by VBA. The requirements of this section will cause heavy scrutiny on IT systems that VBA has been attempting to implement, improve and expand for years. We believe the examination will reveal that progress has been significantly stymied due to lack of directed funding to underwrite IT development and completion, and lack of accountability to ensure these programs work as intended.

#### Recommendations:

- Congress should provide the Veterans Benefits Administration adequate funding for its IT initiatives to improve multiple information and information-processing systems and to advance ongoing, approved and planned initiatives such as those enumerated in this section. We believe these IT programs should be increased annually by a minimum of five percent or more.
- VA should ensure that recent funding specifically designated by Congress to support the IT needs of VBA, and of new VBA staff authorized in fiscal year 2009, are provided to VBA as intended, and on an expedited basis.
- The Chief Information Officer and Under Secretary for Benefits should give high priority to the review and report required by Public Law 110-389, and redouble their efforts to ensure these ongoing VBA initiatives are fully funded and accomplish their stated intentions.

- The Secretary should examine the impact of the current level of IT centralization under the Chief Information Officer on these key VBA programs, and, if warranted, shift appropriate responsibility for their management, planning and budgeting from the CIO to the Under Secretary for Benefits.

## THE CLAIMS PROCESS

In order to make the best use of newly hired personnel resources, Congress must focus on the claims process from beginning to end. The goal must be to reduce delays caused by superfluous procedures, poor training, and lack of accountability.

During the past couple of years, the VA hired a record number of new claims adjudicators. Unfortunately, as a result of retirements by senior employees, an increase in disability claims, the complexity of such claims, and the time required for new employees to become proficient in processing claims, VA has achieved few noticeable improvements.

The claims process is burdensome, extremely complex, and often misunderstood by veterans and many VA employees. Numerous studies have been completed on claims-processing delays and the backlog created by such delays, yet the delays continue. The following suggestions would simplify the claims process by reducing delays caused by superfluous procedures, inadequate training, and little accountability. Other suggestions will provide sound structure with enforceable rights where current law promotes subjectivity and abuses rights.

The subjectivity of the claims process results in large variances in decision making, unnecessary appeals, and claims overdevelopment. In turn, these problems contribute to the duplicative, procedural chaos of the claims process. Congress and the Administration should seek to simplify, strengthen, and provide structure to the VA claims process.

In order to understand the complex procedural characteristics of the claims process, and how these characteristics delay timely adjudication of claims, one must focus on the procedural characteristics and how they affect the claims process as a whole. Whether through expansive judicial orders, repeated mistakes, or variances in VA decision making, some aspects of the claims process have become complex, loosely structured, and open to the personal discretion of individual adjudicators. By strengthening and properly structuring these processes, Congress can build on what otherwise works.

These changes should begin by providing solid, nondiscretionary structure to VA's "duty to notify." Congress meant well when it enacted VA's current statutory "notice" language. It has nonetheless led to unintended consequences that have proven detrimental to the claims process. Many Court of Appeals for Veterans Claims (Court) decisions have expanded upon VA's statutory duty to notify, both in terms of content and timing. However, with the recent passage of P.L. 110-389, the "Veterans Benefits Improvement Act of 2008," Congress, with the Administration's support, took an important step to correct this problem. However, the IBVSOs believe VA can do more.

The VA's administrative appeals process has inefficiencies. The delays caused by these inefficiencies force many claimants into drawn-out battles for justice that may last for years. Delays in the initial claims development and adjudication process are insignificant when

compared to delays that exist in VA's administrative appeals process. The IBVSOs believe VA can eliminate some of the delays in this process administratively, and we urge VA to do so. For example, VA can amend its official forms so that the notice VA sends to a claimant when it makes a decision on a claim includes an explanation about how to obtain review of a VA decision by the Board of Veterans' Appeals (Board) and provides the claimant with a description of the types of reviews that are available.

Another problem that seems to plague the VA's claims process is its apparent propensity to overdevelop claims. One possible cause of this problem is that many claims require medical opinion evidence to help substantiate their validity. There are volumes of Veterans Appeals Reporters filled with case law on the subject of medical opinions, i.e., who is competent to provide them, when are they credible, when are they adequate, when are they legally sufficient, and which ones are more probative, etc.

There is ample room to improve the law concerning medical opinions in a manner that would bring noticeable efficiency to VA's claims process, such as when VA issues a Veterans Claims Assistance Act (VCAA) notice letter. Under current notice requirements and in applicable cases, VA's letter to a claimant normally informs the claimant that he or she may submit a private medical opinion. The letter also states that VA may obtain a medical opinion. However, these notice letters do not inform the claimant of what elements render private medical opinions adequate for VA rating purposes. To correct this deficiency, we recommend to VA that when it issues proposed regulations to implement the recent amendment of title 38, United States Code, section 5103 that its proposed regulations contain a provision that will require it to inform a claimant, in a VCAA notice letter, of the basic elements that make medical opinions adequate for rating purposes.

We believe that if a claimant's physician is made aware of the elements that make a medical opinion adequate for VA rating purposes, and provides VA with such an opinion, VA no longer needs to delay making a decision on a claim by obtaining its own medical opinion. This would reduce the number of appeals that result from conflicting medical opinions-appeals that are ultimately decided in an appellant's favor-more often than not. If the Administration refuses to promulgate regulations that incorporate the foregoing suggestion, Congress should amend VA's notice requirements in section 5103 to require that VA provide such notice regarding the adequacy of medical opinions.

Congress should consider amending section 5103A(d)(1) to provide that when a claimant submits private medical evidence, including a private medical opinion, that is competent, credible, probative, and otherwise adequate for rating purposes, the Secretary shall not request such evidence from a department health-care facility. Some may view this suggestion as an attempt to tie VA's hands with respect to its consideration of private medical opinions. However, it does not. The language we suggest adding to section 5103A(d)(1) would not require VA to accept private medical evidence if, for example, VA finds that the evidence is not credible and therefore not adequate for VA rating purposes.

The IBVSOs also believe that other procedures add unnecessary delays to the claims process. For example, we believe VA routinely continues to develop claims rather than issue decisions even though evidence development appears complete. These actions result in numerous appeals

and unnecessary remands from the Board and the Court. Remands in fully developed cases do nothing but perpetuate the hamster-wheel reputation of veterans law. In fact, the Board remands an extremely large number of appeals solely for unnecessary medical opinions. In FY 2007, the Board remanded 12,269 appeals to obtain medical opinions. Far too many were remanded for no other reason but to obtain a VA medical opinion merely because the appellant had submitted a private medical opinion. Such actions are, we respectfully submit, a serious waste of VA's resources.

The suggested rulemaking actions and recommended changes to sections 5103 and 5103A(d)(1) may have a significant effect on ameliorating some problems. But to further improve these procedures, Congress should amend title 38, United States Code, section 5125. Congress enacted section 5125, for the express purpose of eliminating the former title 38, Code of Federal Regulations, section 3.157(b)(2) requirement that a private physician's medical examination report be verified by an official VA examination report before VA could award benefits. However, Congress enacted section 5125 with discretionary language. This discretionary language permits, but does not require, VA to accept medical opinions from private physicians. Therefore, Congress should amend section 5125 by adding new language that requires VA to accept a private examination report if the VA determines that the report is (1) provided by a competent health-care professional; (2) probative to the issue being decided; (3) credible; and (4) otherwise adequate for adjudicating the claim.

#### Recommendations:

- VA should amend its notification forms to inform claimants of the procedures that are available for obtaining review of a VA decision by the Board of Veterans' Appeals along with providing an explanation of the types of reviews that are available to claimants.
- VA should issue proposed regulations to implement the recent amendment of title 38, United States Code, section 5103 as quickly as possible. The VA's proposed regulations should include provisions that will require VA to notify a claimant, in appropriate circumstances, of the elements that render medical opinions adequate for rating purposes.
- Congress should amend section 5103A(d)(1) to provide that when a claimant submits a private medical opinion that is competent, credible, probative, and otherwise adequate for rating purposes, the Secretary shall not request another medical opinion from a department health care facility.
- Congress should amend title 38, United States Code, section 5125, insofar as it states that a claimant's private examination report "may" be accepted. The new language should direct that the VA "must" accept such report if it is (1) provided by a competent health care professional, (2) probative to the issue being decided, (3) credible, and (4) otherwise adequate for adjudicating such claim.

#### TRAINING:

The IBVSOs have consistently maintained that VA must invest more in training adjudicators and decision makers, and should hold them accountable for higher standards of accuracy. VA has made improvements to its training programs in the past few years; nonetheless, much more improvement is required in order to meet quality standards that disabled veterans and their families deserve.

Training has not been a high enough priority in VA. We have consistently asserted that proper training leads to better quality decisions, and that quality is the key to timeliness of VA decision-making. VA will only achieve such quality when it devotes adequate resources to perform comprehensive and ongoing training and imposes and enforces quality standards through effective quality assurance methods and accountability mechanisms.

The VBA's problems caused by a lack of accountability do not begin in the claims development and rating process-they begin in the training program. There is little measurable accountability in the VBA's training program.

The VBA's unsupervised and unaccountable training system results in no distinction existing between unsatisfactory performance and outstanding performance. This lack of accountability during training further reduces, or even eliminates, employee motivation to excel. This institutional mind-set is further epitomized in VBA's day-to-day performance, where employees throughout VBA are reminded that optimum work output is far more important than quality performance and accurate work.

The effect of VBA's lack of accountability in its training program was demonstrated when it began offering skills certification tests to support certain promotions. Beginning in late 2002, VSR job announcements began identifying VSRs at the GS-11 level, contingent upon successful completion of a certification test. The open book test consisted of 100 multiple-choice questions. VA allowed participants to use online references and any other reference material, including individually prepared notes in order to pass the test.

The first validation test was performed in August 2003. There were 298 participants in the first test. Of these, 75 passed for a pass rate of 25 percent. The VBA conducted a second test in April 2004. Out of 650 participants, 188 passed for a pass rate of 29 percent. Because of the low pass rates on the first two tests, a 20-hour VSR "readiness" training curriculum was developed to prepare VSRs for the test. A third test was administered on May 3, 2006, to 934 VSRs nationwide. Still, the pass rate was only 42 percent. Keep in mind that these tests were not for training; they were to determine promotions from GS-10 to GS-11.

These results reveal a certain irony, in that the VBA will offer a skills certification test for promotion purposes, but does not require comprehensive testing throughout its training curriculum. Mandatory and comprehensive testing designed cumulatively from one subject area to the next, for which the VBA then holds trainees accountable, should be the number one priority of any plan to improve VBA's training program. Further, VBA should not allow trainees to advance to subsequent stages of training until they have successfully completed such testing.

The Veterans' Benefits Improvement Act of 2008 mandated some testing for claims processors and VBA managers, which is an improvement; however, it does not mandate the type of testing during the training process as explain herein. Measurable improvement in the quality of and accountability for training will not occur until such mandates exist. It is quite evident that a culture of quality neither exists, nor is much desired, in the VBA.

Recommendation:

VA should undertake an extensive training program to educate its adjudicators on how to weigh and evaluate medical evidence. In addition, to complement recent improvements in its training programs, VA should require mandatory and comprehensive testing of the claims process and appellate staff. To the extent that VA fails to provide adequate training and testing, Congress should require mandatory and comprehensive testing, under which VA will hold trainees accountable.

## STRONGER ACCOUNTABILITY

In addition to training, accountability is the key to quality, and therefore to timeliness as well. As it currently stands, almost everything in the VBA is production driven. Performance awards cannot be based on production alone; they must also be based on demonstrated quality. However, in order for this to occur, the VBA must implement stronger accountability measures for quality assurance.

The quality assurance tool used by the VA for compensation and pension claims is the Systematic Technical Accuracy Review (STAR) program. Under the STAR program, VA reviews a sampling of decisions from regional offices and bases its national accuracy measures on the percentage with errors that affect entitlement, benefit amount, and effective date.

However, there is a gap in quality assurance for purposes of individual accountability in quality decision making. In the STAR program, a sample is drawn each month from a regional office workload divided between rating, authorization, and fiduciary end-products. However, VA recognizes that these samples are only large enough to determine national and regional office quality. Samples as small as 10 cases per month per office are woefully inadequate to determine individual quality.

While VA attempts to analyze quality trends identified by the STAR review process, claims are so complex, with so many potential variables, that meaningful trend analysis is difficult. As a consequence, the VBA rarely obtains data of sufficient quality to allow it to reform processes, procedures, or policies.

As mentioned above, STAR samples are far too small to allow any conclusions concerning individual quality. That is left to rating team coaches who are charged with reviewing a sample of ratings for each rating veteran service representative (RVSR) each month. This review should, if conducted properly, identify those employees with the greatest problems. In practice, however, most rating team coaches have insufficient time to review what could be 100 or more cases each month. As a consequence, individual quality is often under-evaluated and employees with quality problems fail to receive the extra training and individualized mentoring that might allow them to be competent raters.

In the past 15 years the VBA has moved from a quality-control system for ratings that required three signatures on each rating before it could be promulgated to the requirement of but a single signature. Nearly all VA rating specialists, including those with just a few months' training, have been granted some measure of "single signature" authority. Considering the amount of time it takes to train an RVSR, the complexity of veterans disability law, the frequency of change mandated by judicial decisions, and new legislation or regulatory amendments, a case could and



should be made that the routine review of a second well-trained RVSR would avoid many of the problems that today clog the appeals system.

The Veterans' Benefits Improvement Act of 2008 (section 226) required VA to conduct a study on the effectiveness of the current employee work-credit system and work-management system. In carrying out the study, VA is required to consider, among other things: (1) measures to improve the accountability, quality, and accuracy for processing claims for compensation and pension benefits; (2) accountability for claims adjudication outcomes; and (3) the quality of claims adjudicated. The legislation requires VA to submit the report to Congress, which must include the components required to implement the updated system for evaluating VBA employees, no later than October 31, 2009.

This is a historic opportunity for VA to implement a new methodology-a new philosophy-by developing a new system with a primary focus of quality through accountability. Properly undertaken, the outcome would result in a new institutional mind-set across the VBA-one that focuses on the achievement of excellence-and change a mind-set focused mostly on quantity-for-quantity's sake to a focus of quality and excellence. Those who produce quality work are rewarded and those who do not are finally held accountable.

#### Recommendation:

- The VA Secretary's upcoming report must focus on how the Department will establish a quality assurance and accountability program that will detect, track, and hold responsible those VA employees who commit errors while simultaneously providing employee motivation for the achievement of excellence. VA should generate the report in consultation with veterans service organizations most experienced in the claims process.

We invite your attention to the IB itself for the details of the remaining recommendations, but the following summarizes a number of suggestions to improve benefit programs administered by VBA:

- allow veterans eligible for benefits under title 38, United States Code, sections 31 and 33 to choose the most favorable housing allowance from the two programs
- support legislation to clarify the intent of Congress concerning who is considered to have engaged in combat
- repeal in whole the offset between disability compensation and military retired pay
- provide cost-of-living adjustments for compensation, specially adapted housing grants, and automobile grants, with provisions for automatic annual increases in the housing and automobile grants based on increases in the cost of living
- propose a rule change to the Federal Register that would update the mental health rating criteria
- provide a presumption of service connection for hearing loss and tinnitus for combat veterans and veterans who had military duties involving high levels of noise exposure who suffer from tinnitus or hearing loss of a type typically related to noise exposure or acoustic trauma
- increase the maximum coverage and adjustment of the premium rates for Service-Disabled Veterans' Life Insurance

- increase the maximum coverage available in policies of Veterans' Mortgage Life Insurance
- enforce VA's benefit of the doubt rule in judicial proceedings
- appoint judges to the Court of Appeals for Veterans claims who are advocates experienced VA law
- support legislation to increase Dependency and Indemnity Compensation (DIC) for certain survivors of veterans, and to no longer offset DIC with Survivor Benefit Plan payments. And
- authorize rates of DIC for surviving spouses of service members who die while on active duty to the same rate as those who die while rated totally disabled.

We hope the Committee will review these recommendations and give them consideration for inclusion in your legislative plans for FY 2009. Mr. Chairman, thank you for inviting the DAV and other member organizations of the IB to testify before you today.